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Supreme Court, U.S.
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No. 91-1912

In The

Supreme Court of the United States

October Term, 1991

MICHAEL SCOTT POWERS, Individually, and as Executor under the Last Will and Testament of VICKI SAUNDERSON POWERS, Deceased; ERIN POWERS, by Next Friend MICHAEL SCOTT POWERS; and MEGAN J. POWERS, by Next Friend MICHAEL SCOTT POWERS,

Petitioners,

vs.

KING COTTON, LTD.,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court for the State of Georgia

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Where multiple plaintiffs are represented by one (1) individual serving as his own representative, as the representative of an estate and as the representative of minor plaintiffs, can he constitutionally waive allocation among the various claims?

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RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

As the result of an accident which occurred on October 11,

1986, the family of Michael Scott Powers received various damages including personal injuries to the Husband, Michael Scott Powers, the death of the Wife, Vicki S. Powers, and personal injuries to two (2) children, Erin Powers and Megan Powers. Suit was instituted in the Superior Court of Dougherty County, Georgia, by Michael Scott Powers on behalf on himself, the Estate of his Wife, and as Next Friend of the two (2) minor children. The suit was originally against the driver and owner of the tractor-trailer truck which collided with the Powers' vehicle and King Cotton, Ltd., Respondent herein, the owner of the business from which the truck was leaving at the time of the accident. (There is no relationship between King Cotton and the truck except that of business invitee.)

At the conclusion of the evidence in the first trial, Michael Scott Powers, on behalf of all Petitioners, agreed to a lump sum settlement of $750,000 with the driver and the owner of the truck. The settlement was not allocated by Mr. Powers among the Petitioners even though Respondent indicated to the court prior to the jury's verdict that an allocation of the settlement needed to be made for purposes of set-off. This suggestion was vehemently objected to by Counsel for the Petitioners and he stated to the trial court that there would not be any problem without an allocation since "if the set-off is applicable, it is applicable . . . ."

What Powers was in fact planning was to wait until after the jury returned its verdict so that he could then gerrymander the settlement among the Petitioners to minimize the set-off to which King Cotton would be entitled. Powers waited until after the jury verdict and then immediately went into the Dougherty County Probate Court and petitioned for gerrymandered settlements, all without the knowledge of Respondent, its Counsel or even the trial judge. After this fact was discovered, Respondent petitioned the Probate Court to set aside its orders authorizing the various settlements but the Probate Court declined to consider

the petition of Respondent since its original petitions and orders were facially correct. The Probate Court did *not* conduct a hearing on the merits of the allocations of the settlements.

The judgment entered after the first trial was reversed by the Georgia Court of Appeals and the case was remanded for retrial. Because of the controversy over the issue of set-off, the Court of Appeals gave instructions that either the settlement be disclosed and the jury instructed to consider the settlements in making its verdict or that the settlement should be withheld from the jury and the court would then set-off the amount of the settlement allocated to each Petitioner from the jury's award. Although Respondent wanted to prove the settlements, Petitioners objected to disclosure of the settlement amounts to the jury and Respondent, at Petitioners' request, was ordered by the trial court not to do so. After the second trial the Georgia Court of Appeals held, consistent with its first opinion, that since the settlement had been withheld from the jury and since there had been no proper allocation of settlement by Petitioners as required by law, but merely sham proceedings in the Probate Court which were a nullity, then the only settlement which had been reached was the unallocated lump sum of $750,000 which Powers had purposedly and consciously chosen to leave as a lump sum for all Petitioners that he represented. Thus, the set-off to which Respondent is entitled should be the total of the collective settlement which had been reached, against the total verdicts returned.

REASONS FOR DENYING THE WRIT

Petitioners suggest that this Petition presents to the Court a case wherein the due process clause of the Constitution has been violated. To the contrary, the due process clause is not even at issue in this litigation and what Petitioners are attempting to induce this Court to do is to rehash an issue which has been before the

appellate courts of the State of Georgia and resolved against Petitioners, primarily because of Petitioners own conduct and choice of litigation tactics. There is no constitutional issue for this Court's consideration.

I.

PETITIONERS HAD AMPLE OPPORTUNITY TO SEEK JUDICIAL ALLOCATION OF MULTIPLE PARTY SETTLEMENTS BUT CHOSE NOT TO DO SO IN THE HOPES THAT THEIR ELECTION NOT TO HAVE AN ALLOCATION WOULD BENEFIT THEM AND CANNOT NOW COMPLAIN THAT THEY MADE THE WRONG DECISION.

Petitioners attempt to gain this Court's attention by making reference to the Fourteenth Amendment of the Constitution but they fail to acknowledge that they find themselves in a position of their own making and that the issue of allocation of settlements is a state matter and not a federal question. There is no authority for Petitioners' proposition that the law of the State of Georgia regarding the allocation of settlements and the issue of set-off of settlements against jury verdicts is controlled by federal or constitutional law. Rather, this is merely a tort concept which is to be decided and applied on a state by state basis and according to the wisdom of each individual state's legislature and courts. Contrary to Petitioners' statement, they are attempting to "federalize" state tort law and nothing more. Petitioners fail to cite any authority for the proposition that this Court should inject itself into this process because there is no such authority.

Such matters as the handling of settlement by joint tortfeasors, the effect of a release or covenant not to sue, the effect of dismissal of litigation against joint tortfeasors, and similar issues are dealt with by the various states as they see fit. There is no federal law

which is applicable and there is absolutely no basis for any argument that Georgia law does not provide due process.

The law of the State of Georgia provides and guarantees a proper standard of fundamental fairness to the issue of set-offs and Petitioners should be denied certiorari because of the fact that Petitioners find themselves in a position of their own making which results from a calculated gamble which they took and lost. It is ironic that Petitioners now seek this Court's assistance in ordering that there be an allocation hearing of the settlement which they entered into with the settling Defendants when it was Respondent that requested that Petitioners be forced to determine and announce their allocation before the first jury verdict was returned and again after the first verdict was reversed but before the second trial was conducted, with Petitioners consistently resisting any honest allocation. The record is full of objections by the Petitioners to attempts to obtain a binding and valid allocation and Petitioners can hardly be serious when they now complain that the appellate courts of the State of Georgia have ruled that their refusal to have a proper allocation amounts to a waiver and a decision to treat the claims collectively.

II.

THE AMOUNT OF THE SET-OFF IS CLEAR AND PRECISE.

Petitioners allege that the set-off to be received by Respondent is "unclear" but what Petitioners are truly saying is not that the set-off is unclear but that they are unhappy with it. Petitioners refer this Court to *Phillips v. Liberty Mutual Insurance Company,* 813 F.2d 1173 (11th Cir. 1987), but then totally misrepresent the focus of that case. The importance of that case is the fact that if a defendant takes no steps to protect itself and to require an allocation, then the defendant cannot obtain an allocation after

the fact. Conversely, if Petitioners refuse to have an allocation then they should not now be heard to complain since they waived their right to obtain one, hoping to be able to increase their award and to obtain a double recovery against Respondent.

CONCLUSION

This case presents no constitutional issues at all and does not meet the minimum criteria for certiorari to this Court.

Respectfully submitted,

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